Lowndes County Health Services, Inc. d/b/a Lakehaven Nursing Home *and* United Food and Commercial Workers Union, Local 1996, AFL–CIO, CLC, Petitioner. Case 12–RC–8003

December 31, 1997

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board has considered objections to an election held November 14, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 21 for and 24 against the Union, with 3 challenged ballots, an insufficient number to affect the results.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings[1] and recommendations as modified below.[2]

A. *The Objectionable Conduct*

1. Objection 4 alleges that employees were coercively interrogated about their views on union representation. The hearing officer found that management consultant Joe Sims asked employee Diane Mathis, after she expressed some reluctance to speak to him, whether she ''was in agreement with what was happening.'' Sims separately asked employee La Donna Matchett how she felt about the Union.

The hearing officer found that both interrogations constituted objectionable conduct. She declined to set aside the election, however, because she believed that the misconduct would not sufficiently affect the results of the election.

We agree with the hearing officer that Sims' interrogations of Mathis and Matchett were objectionable.[3] We discuss in section B, below, the question whether the election should be set aside.

2. The hearing officer found that the Petitioner failed to timely submit to the Regional Director evidence in support of the allegation that licensed practical nurse Idella Griffin told employee Vivian Woods that union supporter Jo Hannah Berrian would be fired if the Employer won the election. Accordingly, the hearing officer found that the evidence the Petitioner presented at the hearing should not be considered in determining the validity of the election.[4] Additionally, the hearing officer concluded that even if the record evidence were considered, Griffin was not a supervisor or, alternatively, even if she was a supervisor, the statement, although made, was isolated.

With respect to the issue of the timeliness of the Petitioner's evidence, the Petitioner contends that it submitted Woods' affidavit (which explicitly delineates Griffin's threat that Berrian would be fired if the Employer prevailed in the election) to the Regional Director before the close of the period for filing evidence in support of its objections. The hearing officer found that the evidence was not submitted prior to the expiration of the time for filing objections. However, the hearing officer did not contradict the Petitioner's assertion that the evidence was submitted prior to the time set by the Regional Director for receiving evidence in support of the objections. Indeed, there is nothing to contradict the Petitioner's assertion. Further, the Regional Director considered the evidence in her investigation of this case. Her Order Directing Hearing does not exclude the alleged threat from hearing, but rather orders broadly that a hearing be held ''for the purposes of receiving testimony to resolve the issues raised by the Petitioner's Objections.'' We conclude, therefore, that the Regional Director received and considered the Petitioner's timely submitted evidence of a threat to fire a union supporter, and determined that such evidence raised substantial and material factual issues warranting hearing. The threat allegation, therefore, was properly before the hearing officer for consideration, and is properly before the Board now.

Turning to the merits of the Petitioner's allegation, we find, contrary to the hearing officer, that it is undisputed that Griffin is a supervisor. The parties executed a Stipulated Election Agreement providing that LPN charge nurses are supervisors, and the Employer's director of nursing testified that LPN Griffin was a supervisor. We also find, contrary to the hearing officer, that Griffin's statement to Woods, on the night before

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] Given our findings below, we find it unnecessary to pass on the hearing officer's recommendation regarding the Petitioner's Objection 1 and on that part of the catchall objection relating to the solicitation of grievances. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Petitioner's Objections 2 and 3 be overruled.

[3] Indeed, the Employer has not excepted to the finding of objectionable conduct.

Chairman Gould agrees that the interrogations were objectionable. He, however, finds it unnecessary to rely on *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[4] The evidence in question was presented under the Petitioner's timely filed ''catch all'' objection, which alleges as follows: ''By these and other acts and conduct, the Employer has interfered with the employees' free choice of a bargaining representative.''

the election, that union supporter Berrian would be fired if the Employer won the election constitutes an objectionable threat that would reasonably tend to interfere with Woods' free choice in the election.

B. *Whether the Election Should Be Set Aside*

We have found above that the Employer engaged in objectionable conduct when Sims interrogated employees Mathis and Matchett, and when Griffin told employee Woods that another employee would be fired if the Employer prevailed in the election. We now turn to the issue of whether this misconduct warrants invalidating the election.

''In resolving the question of whether certain Employer misconduct is de minimis with respect to affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.'' *Caron International*, 246 NLRB 1120 (1979).

The hearing officer's findings with respect to these factors are not correct. The hearing officer found that only two employees were affected by the interrogations. Matchett testified, however, that she told two other bargaining unit employees about her conversation with Sims,[5] thus increasing to four the number of employees aware of Sims' objectionable conduct.

The hearing officer also found that the Petitioner needed four additional votes to win the election. However, it is clear from the revised tally of ballots that a shift in as few as two votes would have changed the election results from 21–24 against representation to 23–22 in favor of representation, with three determinative challenged ballots.

Finally, the hearing officer failed to recognize that a threat of discharge is highly coercive and one of the most serious forms of employer misconduct. See, e.g., *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980).

In sum, there were several incidents of objectionable conduct, including a serious threat, at least five employees were aware of the misconduct, and a change in only a few votes could have altered the outcome. In such circumstances, we cannot conclude that the Employer's misconduct was de minimis. Accordingly, we shall set the election aside.

[Direction of Second Election omitted from publication.]

[5] The hearing officer acknowledged that Matchett discussed this conversation with two other employees, but also found that she ''did not specify the contents'' of the conversation. Matchett testified that she told two employees ''about'' her conversation with Sims; she never actually testified about how much detail she told the two employees. Contrary to the hearing officer, we would infer from this testimony that Matchett disseminated the objectionable interrogation to two other employees.